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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MICHELIN TIRE CORPORATION and LA MANUFACTURE FRANCAISE DES PNEUMATIQUES MICHELIN,
Petitioners,

v.

MAUDELL H. FALLAW; FLETCHER L. FALLAW; SOUTHEASTERN FREIGHT LINES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals below correctly hold that jury nondisclosure of material information when properly questioned during voir dire examination is not a valid ground for the granting of a new trial unless such nondisclosure is deliberate or intentional?

LISTING PURSUANT TO SUPREME COURT RULE 28.1

Michelin Tire Corporation is a New York corporation. Its parent companies are the Michelin Corporation, the Michelin Investment Holding Company, Compagnie Financiere Michelin and Compagnie Generale des Etablissements Michelin. It has no subsidiaries or affiliates.

La Manufacture Francaise Des Pneumatiques Michelin is a French company. Its parent company is Compagnie Generale des Etablissements Michelin. Other than wholly owned subsidiaries, it has an indirect partial holding in Kleber Colombes, another French tire company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LISTING PURSUANT TO SUPREME COURT RULE 28.1	i
GROUNDS FOR INVOKING JURISDICTION OF COURT	1
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
Consolidated Gas & Equipment Co. of America v. *Carver*, 257 F.2d 111 (10th Cir. 1958)	5
McCoy v. *Goldston*, 652 F.2d 654 (6th Cir. 1981)	5
Photostat Corporation v. *Ball*, 338 F.2d 783 (10th Cir. 1964)	4
Swain v. *Alabama*, 380 U.S. 202 (1965)	7
Vezina v. *Theriot Marine Serv., Inc.*, 554 F.2d 654 (5th Cir. 1977)	6
OTHER AUTHORITIES CITED:	
28 U.S.C. § 1254(1)	1

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GROUNDS FOR INVOKING JURISDICTION OF COURT

The opinion below is dated May 20, 1982. No petition for rehearing was filed. The judgments of the United States Court of Appeals for the Fourth Circuit are also dated May 20, 1982. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. The United States District Court for South Carolina wrote no opinion but made oral pronouncements in denying Petitioners' motion for new trial. Both the unpublished opinion and the oral pronouncements are reproduced in the Appendix.

STATEMENT OF THE CASE

This litigation arises out of a collision between a tractor-trailer rig and a tanker rig. The tractor-trailer was equipped with Michelin tires. Respondents sued Petitioners, as manufacturers of the tires, alleging the collision was caused by a defective tire. Suits seeking recovery for personal injury and property damages were filed in the United States District Court for South Carolina, federal jurisdiction being based on diversity of citizenship. A prior appeal involving discovery of trade secrets was mooted by a stipulation of the parties which was recognized by the United States Court of Appeals for the Fourth Circuit. Under this stipulation the determinative question as to liability was whether the tire blew out without being punctured by an external object or whether the blowout resulted from the penetration of an external object.

When the jury was being selected to try the cause, the entire venire was asked by the trial judge:

> Have any of you ever been a Plaintiff or a Defendant in an action brought for damages?
>
> Has anyone ever sued you or have you ever sued anybody for money as a result of damages or injuries you or that other person allegedly sustained? If so, please stand.

Mrs. Polk made no response to either question, was selected as a juror by the parties, and was later appointed foreperson of the jury by the trial judge.

The trial judge also asked the prospective jurors:

> Have any of you or members of your immediate family, close friends or business associates ever operated or been a passenger in a vehicle when a tire

> blew out? If so, please stand and explain the circumstances.

Neither Mrs. Pennington nor Mrs. Carrigg made any response to the question. Both were selected jurors.

Thereafter, on conflicting evidence, the jury found Petitioners liable and awarded Respondents damages totaling $1,370,500.00.

In post trial proceedings, it was first learned that three of the six jurors had failed to disclose material information during voir dire examination. Mrs. Polk, the foreperson, failed to disclose that she had settled a personal injury case before trial and had another personal injury claim pending at the time of trial. In addition, Mrs. Pennington and Mrs. Carrigg had prior tire blowout experiences that they did not reveal.

The District Court denied Petitioners' motion for new trial on the ground of juror nondisclosure, finding that such nondisclosure was not intentional.[1] The Court of Appeals affirmed, holding:

> With respect to all three jurors, the district court found the absence of any intention to withhold information, and we accept that finding as not clearly erroneous. Had there been deliberate untruthfulness, at least when compounded by possible bias, defendants would have been entitled to a new trial. *See United States* v. *Bynum*, 634 F.2d 768, 771 (4 Cir. 1980); *McCoy* v. *Golstein*, (sic) 652 F.2d 654, 658 (6 cir. 1981). But, here, where the nondisclosure was

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[1] The District Court "found" in oral pronouncements from the bench that Mrs. Polk did not hear the questions; that Mrs. Pennington did not remember her prior blowout; and that Mrs. Carrigg did not regard her prior experience as a "blowout" when she ran her truck into a curb to avoid an accident and had a blowout.

> not deliberate, the only inquiry is whether the juror's post-verdict responses disclosed actual bias or prejudice as a matter of law. *See United States* v. *Vargas*, 606 F.2d 341, 344 (1 Cir. 1979); *United States* v. *Mulligan*, 573 F.2d 775, 777 (2 Cir.), *cert. denied*, 439 U.S. 827 (1978). We think that these jurors' answers did not satisfy this test. . . .

This petition for writ of certiorari seeks to question the correctness of the above holding and the wisdom of adopting such a rule in the federal courts.

REASONS FOR GRANTING THE WRIT

Petitioners urge the Court to grant this petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit for the following reasons:

1. The Fourth Circuit Court of Appeals below has rendered a decision in conflict with decisions of other federal courts of appeal. While the rule in some circuits is, as held below, that juror nondisclosure must be intentional to warrant a new trial, other circuits hold that a new trial must be granted if the nondisclosure results in substantial impairment of the right to exercise peremptory challenges intelligently.

In *Photostat Corporation* v. *Ball*, 338 F.2d 783 (10th Cir. 1964), certain jurors failed to disclose prior personal injury claims on voir dire. The trial court, however, denied a new trial on the ground that the nondisclosure was not intentional and defendant received a fair trial. On appeal, the Tenth Circuit reversed, stating:

> . . . It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information was of sufficient cogency and significance to cause us to believe that counsel was entitled to know of it when he came to exercise

> his right of peremptory challenge. If so, the suppression was a prejudicial impairment of his right.
>
> None of the jurors in our case or any of their immediate family were or had been plaintiffs in a pending suit. On the record, their involvement in automobile accidents with resultant claims were inadvertently withheld due to a misunderstanding of the questions on voir dire. But the information was withheld through no fault of the unsuccessful litigant. But it did involve experiences of these jurors which gave rise to claims for damages for which they were paid. When these experiences are considered separately or in totality, we think they were of such nature and gravity as to generate an attitude of probable bias in favor of the plaintiff and against the defendant's cause. In any event, we have no doubt that counsel was entitled to know about them.
>
> The case is accordingly reversed with directions to grant a new trial. (338 F.2d at 787).

To like effect is the Tenth Circuit's earlier opinion in *Consolidated Gas & Equipment Co. of America* v. *Carver*, 257 F.2d 111, 115 (10th Cir. 1958):

> . . . Whether so intended or not, the effect of the silence of the juror was to deceive and mislead the court and the litigants in respect to his competency. And such deception and misleading had the effect of nullifying the right of peremptory challenge as completely as though the court had wrongfully denied such right . . .

The rule in the Sixth Circuit is a dual test, adopting both the Fourth Circuit "deliberate concealment" rule and the Eighth Circuit's "substantial impairment of voir dire examination" rule. In *McCoy* v. *Goldston*, 652 F.2d 654, 658-659 (6th Cir. 1981), the Sixth Circuit held:

> First, deliberate concealment or purposefully incorrect responses during *voir dire* suffice to show a

prejudicial impairment of the right to the exercise of peremptory challenges. A district court should consider the following factors to determine if a juror has intentionally concealed or purposefully given incorrect answers:

A. Whether the question asked sufficiently inquired into the subject matter to be disclosed by the juror.

B. Whether the response of other jurors to the question asked would put a reasonable person on notice that an answer was required.

C. Whether at any time during the trial the juror became aware of his false or misleading answer and failed to notify the district court.

Second, a prejudicial impairment of the right to the exercise of peremptory challenges also is established if the undisclosed information is indicative of probable bias concerning either a material aspect of the litigation or its outcome.

In *Vezina* v. *Theriot Marine Serv., Inc.*, 554 F.2d 654, 656 (5th Cir. 1977), the Fifth Circuit rejected the Eighth Circuit's rule and refused to adopt any hard and fast rule, saying:

> Appellant cites *Photostat Corporation* v. *Ball*, 10 Cir., 1964, 338 F.2d 783 and *Consolidated Gas & Equipment Co. of America* v. *Carver*, 10 Cir., 1958, 257 F.2d 111, where the Tenth Circuit remanded for a new trial cases in which jurors withheld information on voir dire relative to their prior involvement as parties in personal injury cases. The court held that because of the "cogency and significance" of the suppressed information, the unsuccessful litigant's right of peremptory challenge was prejudicially impaired. *See Photostat, supra*, 338 F.2d at 787.
>
> In this Circuit there is no hard and fast rule requiring a new trial for failure of a juror at voir dire examination to disclose in a personal injury case the fact that

he was a party in a similar case. In the absence of a showing of prejudice to a litigant the mere failure of a jury to make such a disclosure is not ground for a new trial. *Atlas Roofing Manufacturing Company* v. *Parnell*, 5 Cir., 1969, 409 F.2d 1191. The determination of whether a new trial should be granted because of jury misconduct is left to the sound discretion of the trial court and must be decided on an *ad hoc* basis. *See Garcia* v. *Murphy Pacific Marine Salvaging Company*, 5 Cir., 1973, 476 F.2d 303; *Lowe* v. *O'Meara*, 5 Cir., 1973, 482 F.2d 1373.

The federal system, at present, lacks a uniform rule regarding the effect of juror nondisclosure of material information during voir dire. This Court alone can establish such uniformity.

2. The holding below does not accord with the applicable decisions of this Court. The peremptory challenge is regarded as "a necessary part of trial by jury" and "denial or impairment of the right is reversible error without a showing of prejudice." *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965). When material information is not disclosed by prospective jurors the right to exercise peremptory challenges is impaired even if such nondisclosure is caused by impaired hearing or memory rather than a juror's intent to deceive.

3. The quest for justice in the federal system is not well served by the lack of uniformity which now exists. The effect of a federal juror's nondisclosure during voir dire should be the same no matter where it occurs.

CONCLUSION

Petitioners respectfully submit that the petition should be granted.

Respectfully submitted,

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